IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. _____

MICHAEL ISAAC LASKY, 79-252

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE CHIEF JUSTICE AND TO THE
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in United States of America v. Michael Isaac Lasky, No. 77-1380, predicted upon the following:

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1), Petitioner having asserted below deprivation of rights, secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth and Fifth Amendments to the Constitution of the United States.

STATEMENT

Appellant, Michael Isaac Lasky, along with five co-defendants, was charged by way of indictment filed April 29, 1976, with 48 counts of violation of 18 U.S.C. 1341 (mail fraud). On May 25, 1976, Appellant pled not guilty to all of the charges. The United States Postal Service had earlier filed an administrative complaint seeking the suspension of mail service to Space Advertising, Inc., of which Petitioner Lasky was the President. The complaint alleged that Space had violated 39 U.S.C. Section 3005 by using the U.S. mail to bill businesses for advertisements placed by other agencies or to bill businesses for advertisements never placed. An Administrative Law Judge held a hearing and dismissed the action on the grounds that the evidence failed to show that Space was engaged in a scheme or device

for obtaining money or property through the mails by means of false representations.

On July 23, 1976, Appellant filed a Motion to Dismiss Indictment, Motion to Suppress re Search Warrant, and traversed the Government's opposition to these motions. On October 4, 1976, Petitioner's Motion to Suppress and Motion to Dismiss the indictment on the ground that it was unintelligible, ambiguous and failed to state an offense, was denied.

On October 26, 1976, after submission of further documentation, the Court denied Appellant's motion to dismiss on the ground that the indictment was collaterally estopped due to prior governmental prosecution. On the same date, trial by jury commenced. On the 15th day of the trial, motion for judgment for acquittal was granted as to one defendant and denied as to the remaining defendants. An amended indictment, alleging 23 counts as to Appellant, was filed on December 6, 1976, by stipulation

On December 6, 1976, the jury began its deliberations and on December 15, 1976, the jury found Appellant guilty as charged as to each count alleged in the amended indictment.

The Court denied Appellant's motion for judgment of acquittal and motion for a new trial on January 17, 1977. On the same date, the Court sentenced Appellant to serve five years imprisonment on each count, to run concurrently;

eligibility for parole to be at such time the Board of Parole determines pursuant to the provisions of Title 18, U.S.C. Section 4205(b)(2) and Appellant was fined $1,000 consecutively as to counts 1 through 15.

On January 17, 1977, Appellant filed a timely notice of appeal from the judgment and sentence of the Court and on July 16, 1979, the United States Court of Appeal for the Ninth Circuit affirmed the conviction. A copy of the Opinion of the Court of Appeal is appended hereto as Appendix "A".

QUESTIONS PRESENTED

I. Prosecution of this case is barred by a prior valid and final judgment determining the same issue of ultimate fact: Collateral Estoppel.

II. Presentation of thousands of hearsay complaint letters unrelated to the counts of the indictment was unduly prejudicial.

III. The Government's failure to inform the Grand Jury of the positive decision of the Administrative Law Judge is a denial of due process.

IV. The search warrant was in violation of Aguilar v. Texas and was invalid.

V. A series of erroneous evidentiary rulings deprived Petitioner of his right to a fair trial and were a violation of due process.

I

COLLATERAL ESTOPPEL

On July 23, 1976, Petitioner filed a Motion to Dismiss the Indictment (Clerk's Transcript pages 32-42). Appended to this Motion was the Decision of the Administrative Law Judge on the Complaint of the United States Postal Service (C.T. pages 42-56).

Argument on the Motion to Dismiss commenced on October 4,1976. The Court took the matter under submission on that date (C.T. page 119). There was further argument on October 12,1976 (C.T. page 120) and again the matter was submitted. On October 18,1976 or October 19,1976, the Court ordered that counsel for the moving party prepare a memorandum on this issue. (There are two dates indicated on this minute order. Assumably, the later date was a mailing date. Under any circumstances, counsel was given only 2-3 days from date of issuance of the minute order until the memorandum was due. Since counsel did not even receive the minute order until after the due date, the 2-3 day period was certainly inadequate and denied Petitioner the opportunity to comply with the court order.)

There was further argument on the Motion on October 26,1976. The Court stated: "The Court took under submission the issue about the motion to dismiss under the collateral estoppel doctrine. It was like pulling teeth, gentlemen, in terms of getting the appropriate documents so the Court could take a very close look at the Administrative

hearing records and the documents to determine whether there is a true viable issue relative to collateral estoppel." (Reporter's Transcript page 4).

One of the reasons given during argument for the difficulty in obtaining the records of the Administrative hearing was failure of the U.S. Attorney to turn over the transcript. Counsel for Petitioner informed the Court on October 4 that "Now, unfortunately, I have asked in my discovery of (U.S. Attorney) Mr. Sharenow to give me a copy of the transcript of that hearing, but he, due to the fact that he has been in trial up until very recently, hasn't had the time to do it." (R.T. page A-8, lines 15-19)... "The transcript of the hearing, I think, is available to the Court through the office of the U.S. Attorney. I do not have a copy of it." (R.T. page A-9, lines 24-25).

On December 21, 1977, Petitioner filed a Motion to Supplement the Record on Appeal so as to include the Postal Service's file, the transcript of the Postal hearing and the exhibits to which reference was made during the October 4 hearing (R.T. page A-9, lines 15-23). This Motion was granted by the Court of Appeals on December 30, 1977.

Even assuming that the District Court had its difficulties in obtaining the necessary documentation, it is Petitioner's contention that he met his burden of proving that the same

issues were involved in both cases and were decided in his favor at the prior trial. (Turley v. Wyrick, 554 F.2d 840, 842 (8th Cir. 1977), Cert. denied 434 U.S. 1033 (1978).

The issue of fact tried in both the Postal hearing and criminal case was whether or not a scheme was devised to defraud others, by means of representations through use of the mail.

The applicable statutes were 39 U.S.C. Section 3005 in the Postal hearing and 18 U.S.C. Section 1341 in the criminal case. These sections read as follows in pertinent part.

> 39 U.S.C. Section 3005 "... any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations,..."
>
> 18 U.S.C. Section 1341 "... whoever, having devised any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... places in any post office or authorized depository for mail...."

In order to establish a violation of 18 U.S.C. Section 1341, it must be

shown that the defendant devised a scheme to defraud others of money by means of false or fraudulent pretenses, representations or promises; that in furtherance of the scheme the mail was used, and that these acts were committed knowingly and willfully, and with specific intent. (United States v. Goldberg, 455 F.2d 479 (9th Cir. 1972).)

In order to establish a violation of 39 U.S.C. Section 3005, it must be shown that a person devised a scheme to obtain money through the mail by means of false representations. It matters not whether the person's acts are intentional. (Lynch v. Blount, 330 F. Supp. 689 (1971).)

The case of Ashe v. Swenson (397 U.S. 436, 90 S.Ct. 1189 (1970).) sets forth the general principles of collateral estoppel. The petitioner in that case was accused of having robbed at gunpoint a participant in a poker game. He was acquitted of the robbery. Thereafter he was tried for the armed robbery of another participant in the same game. This court stated

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when a issue of ultimate fact has once been determined by a valid and final

judgment, that issue cannot again be litigated between the same parties in any future lawsuit..."
397 U.S. 442 at 443 90 S.Ct. 1189 at 1194.

The concept of a first "dry run" trial in preparation for a more forceful second trial on the same issues is repugnant to Constitutional principles. In some contexts "practice makes perfect" and this is particularly true in the case of witness testimony.

So, for example in this action David Bayless testified extensively for the prosecution. Yet the Administrative Law Judge at the Postal hearing ruled as follows (see C.T. page 54-55):

"14. A former employee of respondents named David Bayless was produced as a witness by complainant. Bayless had been a telephone solicitor and, for a short time, sales manager for respondents. He testified, among other things, that about one percent of respondents' business was generated by telephone solicitations and the remaining ninety-nine percent was generated by the "lifting" of ads from other publications, having them printed and then billing and rebilling business addressees who had not authorized such services (Tr. 450).

15. According to other evidence in the record, Bayless had an unsatisfactory employment record with respondents and left their employ following a heated

argument with respondents' President Michael Lasky, during which Bayless threatened to make damaging reports concerning respondents' business activities to various federal and local agencies unless he was paid the sum of $10,000 to $15,000 in cash immediately. I find that although Bayless may have been owed some amount of money for services rendered respondents at the time of this argument, such amount was substantially less than the amount he demanded.

16. Many of Bayless' sales during the period he served as a telephone solicitor were unauthorized and were not detected as such in the confirmation process described above because Bayless had arranged with another employee to exempt Bayless' sales from that process (Tr. 604-607).

17. Based on observation of the witness Bayless and evidence given by and concerning him, I find his testimony to be largely incredible."

There was an identity of parties to both the Administrative hearing and this action. In the Administrative hearing, the plaintiff was the Postal Service, a branch of the United States Government. The United States was the plaintiff in the criminal prosecution. In both instances, the Postal Service conducted the investigation and the Office of the United States Attorney prosecuted. The identity of the plaintiff is one. To say otherwise, would condone

a multiplicity of prosecutions under different government agency titles not contemplated by the mandates of Ashe v. Swenson, supra.

In the Administrative hearing the defendent was Space Advertising and all its "doing business as" associates. In the criminal proceeding, Petitioner was the named defendant and it was stipulated that he was President of Space and all of the d.b.a. associates.

As the basis of the criminal prosecution, Petitioner was charged with forming Space and its d.b.a. associates as a part of the scheme to defraud and the acts for which Petitioner was convicted were acts alleged to have been committed in his exercise of his corporate duties as President of the corporation. Conversely, had Petitioner had no interest or association with the corporation, he would have had a complete defense. At the Postal hearing the Government proceeded against the corporation and its d.b.a.'s , only because the statute requires it to proceed against the party to whom the mail is addressed. In defense, Petitioner demonstrated that as President of the corporation and its d.b.a. associates, no fraud was committed.

The safeguards inherent in the Fifth Amendment prohibition against double jeopardy do not countenance multiple prosecutions arising out of the same sphere of facts aimed at one defendant. In both civil and criminal law, in instances of fraud, the plaintiff

is permitted to pierce the corporate veil and hold the officers of the corporation personally accountable. Fair play requires that the opposite be true. To say otherwise, would permit the Government endless opportunity to indict and try this Petitioner for acts on each d.b.a. company, had he been acquitted of the charges presently on appeal.

The time period was likewise identical. The criminal indictment alleges a scheme commencing on October 1, 1971, and continuing until November 30, 1975. The Postal case alleged a scheme from November 11, 1970 to November 11, 1975. In both cases evidence was presented concerning the same period of time.

The issue in both cases was whether or not there was a fraudulent mail scheme in effect. In both cases, Petitioner, as President of Space and its d.b.a. associates, was the person responsible for what sent on at Space.

The Government presented the same evidence in both cases. Any difference can only be explained by the prosecutor's choice in the first instance, not to use what he had by virtue of the October 1974 seizure.

The Administrative Law Judge made the following conclusions of law:

"1. Although Complainant proved that respondents billed a small number of business enterprises for services they had not authorized, on the basis of all

the credible evidence in the record I am unable to conclude that such billings reflected a scheme, device, or policy of respondents to collect or attempt to collect moneys for services not authorized. I conclude that such billings were either the result of error or the unauthorized actions of employees of respondents inconsistent with respondents' policy of performing and billing for only properly authorized services.

2. Complainant has failed to prove by a preponderance of the credible evidence that respondents are engaged in a scheme or device for obtaining money or property through the mails by means of false representations in violation of 39 U.S.C. Section 3005 as alleged in the complaint.

3. Accordingly, the complaint is dismissed."

If two statutes charge the same offense, it must be shown that the violation of each statute is proven by the same evidence. (Blockburger v. United States, 284 U.S. 299; Kistner v. United States, 332 F.2d 978). In the instant case, the same evidence was used in both cases. The failure of the Government to use all that they had at the first trial does not give them a legal second bite at the same apple.

II

THE OVERWHELMING PREJUDICIAL EFFECT OF THOUSANDS OF COMPLAINT LETTERS DENIED PETITIONER A FAIR TRIAL

Evidence was introduced in the form of testimony and in the form of hundreds of complaint letters regarding Space Advertising and its d.b.a. associates. None of this evidence was relevant to proof of the counts specified in the indictment. Some of these letters were written directly to Space, others were written to other entities or the Better Business Bureau. In some instances, there were duplications of letters found at Space which caused the notebook files considered by the jury to be thicker and, therefore, contain more complaints.

While it may be true that the jury was admonished that these complaint letters were to be considered for the limited purpose of notice to Space, permitting the jury to read all of this material was prejudicial beyond words.

A close relationship exists between Rule 105 of the Federal Rules of Evidence which allows for limited admissibility and Rule 403 which requires exclusion when 'probative value is substantially out-weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'

There is no precise mathematical formula which determines the permissible

balance between probative value and prejudice. In many cases, the cumulative effect of prejudicial evidence-even if presented with the limited use caveat is so overwhelming as to tip the scales against admission.

A juror is only human. It would be ideal if each juror was able to assimilate evidence and reject in his/her mind the cumulative effect of thousands of complaint letters. A limiting instruction is intended to act as a kind of "reject" button which in a computer may operate to turn off or repel assimilation of irrelevant information. Fortunately or unfortunately as the case may be, jurors do not operate as computers. This is the entire purpose of Rule 403: to prevent prejudicial overload and judicially sanctioned overkill which operate to deprive litigants of their right to a fair trial.

III

FAILURE TO INFORM THE GRAND JURY OF THE DISMISSAL OF THE COMPLAINT BY THE ADMINISTRATIVE LAW JUDGE WAS A DENIAL OF DUE PROCESS

In the case of Johnson v. Superior Court (1975) 539 P2d 792, 15 Cal 3d 248, 124 Cal Rptr 32 the California Supreme Court held that when a prosecutor seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated to inform the grand jury of its nature and existence. In that case, a magistrate had dismissed a complaint against the defendant. The same charges were then submitted to a grand jury, and the prosecutor did not inform the grand jury of the earlier dismissal.

The basis for the California Supreme Court's holding is that the grand jury has the "historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." United States v. Dionisio, 93 S.Ct. 764 at 773, 410 U.S. 1 at 17. Since the general role of the prosecutor "is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charges upon which the Defendant stands trial," (In re Ferguson, 1971, 5 Cal 3d 525, 531, 96 Cal Rptr 594, 598, 487 P2d 1234, 1238), the prosecutor is under an affirmative obligation to bring exculpatory evidence to the attention of the grand jury.

In the instant case, the U.S. Attorney failed to inform the grand jury that the Administrative Law Judge had dismissed the complaint on substantive grounds. Additionally, there was testimony that certain witnesses who were scheduled to testify before the grand jury were excused by the U.S. Attorney when he realized that their testimony was going to be favorable to the defense. (See testimony of Rhea Kohler R.T. pages 2904-2907).

We must again examine the function of the grand jury. The Fifth Amendment requirement of a grand jury is an attempt to "afford a safeguard against oppressive actions of prosecutor or court." Gaither v. United States, 1969, 413 F2d 1061, 134 U.S. App D.C. 154. While it is true that the "Grand Jury's scope of inquiry is not limited to events themselves which may result in criminal prosecution, but is properly concerned with any evidence which may afford valuable leads for investigation of suspected criminal activity" (Matter of Wood, DCNY 1977, 430 F Supp 41), the c orollary should also be true: evidence or leads which tend to exculpate should also be within the scope of inquiry of the Grand Jury.

In the case of United States v. Dionisio, supra, the United States Supreme Court stated that the constitutional guarantee of grand jury presupposes an investigative body "whose mission is to clear the innocent no less than to bring to trial those who may be guilty." 93 S.Ct. at 773, 410 U.S. at 17.

The California Supreme Court has

held in Johnson v. Superior Court, supra, that in order for the grand jury to perform the two-fold objective as expressed in Dionisio, it must be presented with exculpatory evidence. This position is only logical: as the court stated in Johnson: "If the prosecutor does not bring exculpatory evidence to the attention of the grand jury, the jury is unlikely to learn of it." 15 Cal 3d at 255.

The purpose of the Fifth amendment provision is to assure that a body independent of the prosecutorial branch of government finds probable cause for criminal prosecution. As the United States Supreme Court stated in the case of Stirone v. United States, Pa 1960, 80 S.Ct. 270, 361 U.S. 212: the independent nature of the grand jury inquiry serves "to protect the citizen against unfounded accusation, whether it comes from government, or (is) prompted by partisan passion or private enmity."

With all due respect for the holding in the case of Costello v. United States (1956) 350 U.S. 359, 76 S.Ct. 406, it is Petitioner's contention that it is not applicable here. Costello involved the question of whether a grand jury indictment could be returned when it was based only on hearsay evidence. The Supreme Court ruled that the grand jury should be able to conduct their inquiries unfettered by "technical rules." The technical rules relating to hearsay evidence are not what we are dealing with in this case. The issue we are confronted with here relates to the very basic purpose of the grand jury: to ensure that a single-minded prosecutor does not "railroad"

a prospective indictee. Only by following the California rule that a prosecutor is affirmatively required to disclose exculpatory evidence can the true function of the grand jury be fulfilled. Otherwise, the grand jury merely becomes an arm of the office of the U.S. Attorney.

IV

THE SEARCH WARRANT WAS IN VIOLATION OF AGUILAR V. TEXAS AND WAS INVALID

Prior to trial, Petitioner filed a Motion to Suppress Evidence seized by the Government pursuant to a search warrant issued on October 20,1974 and executed on October 30,1974.

The motion was based upon the contention that upon the four corners of the warrant, the warrant failed to meet the standards set forth in Aguilar v. Texas, 378 U.S. 108 and Spinelli v. United States, Mo.1969, 393 U.S. 410, 89 S. Ct. 584.

The affidavit in support of the warrant was defective in that it failed to recite reliable and current information from a reliable source, leading a reasonable man to the conclusion that the crime of mail fraud had been committed.

Although the affidavit is detailed, the details constitute a mere recitation that the affiant received complaints about Space Advertising. "Complaints" do not consitute reliable cause for the belief that a crime is being committed, nor is it an element of, or instrumentality of the crime of mail fraud. Nor does the mere fact that the affiant was informed that the employees of Space used fictitious names, an element of or instrumentality of fraud.

The only evidence of a crime referred to in this affidavit is affiant's statement that he was in receipt of invoices which persons indicated to him represented unauthorized billings. Inasmuch as the affiant was already in receipt of the alleged instrumentalities of the crime, a search of the premises to turn up what could be found constitutes a mere fishing expedition not contemplated by the Fourth Amendment.

V

A SERIES OF ERRONEOUS EVIDENTIARY RULINGS INDIVIDUALLY AND CUMULATIVELY DENIED PETITIONER HIS RIGHT TO DUE PROCESS OF LAW TO FAIR TRIAL

The Government's case consisted of three parts: First, the testimony of alleged count and non-count victims; Second, the testimony of former employees of Space Advertising and Third, documentation most of which consisted of the complaint letters heretofore discussed.

The testimony of David Roberts and David Bayless did furnish the government with the crux of its case. In both instances the witnesses testified that Space Advertising, headed by Petitioner, engaged in a scheme of unauthorized sales and collection practices.

No matter how surfacely damning the testimony of these two witnesses appears, it is Petitioner's contention that certain evidentiary rulings were so unduly prejudicial to the defense that reversal is mandated.

Roberts testified that he lied to the Grand Jury and lied in an affidavit given to Petitioner's attorney wherein he stated that there were no illegal practices committed at Space Advertising. Roberts stated that he was indicted in this case, another case and a third case was threatened if he did not testify favorably in this case for the Government.

He testified that he pled guilty to one count in this case and one count in another case.

The Government promised Roberts that he would not be prosecuted for perjury committed before the Grand Jury. At the Grand Jury, Roberts had taken the Fifth Amendment concerning his business activities after he left Space and for which he was ultimately indicted. On re-direct examination, the Assistant U.S. Attorney asked Roberts upon "what model did you base...your new business?" (R.T. p.1175). Over objection, Roberts testified:"It was a procedure I learned working at Space Advertising." (R.T. p.1176). Further objection and motion for mistrial was denied.

The objection to this testimony was made on the ground that the subsequent acts and guilty plea of Roberts in another case, committed by him after he left Petitioner's employ and formed his own company were irrelevant. Further, when Roberts stated that his second indictment was predicated on what he learned at Space, this elevated his plea of guilty in an unrelated case as evidence of Petitioner's guilt in this case.

The Court of Appeals found that Robert's testimony was relevant to reflect the witness's knowledge of Space's business practices. However here, a plea of guilty of a co-defendant which plea was made in an unrelated case was in essence admitted to demonstrate Petitioner's guilt in this case. Petitioner urges that this type of highly prejudicial matter was not admissible evidence under any legal theory. The conclusionary statement of witness Roberts that he committed other crimes because he patterned his business

after that operated by Petitioner is totally unrelated to the charges for which Petitioner was being tried and the prejudicial impact is unescapable. Roberts' statement was persuasive and damning to Petitioner. Its prejudicial effect is unmeasurable and warrants reversal. Once again the limited relevance of the testimony (i.e. only as to the witness' knowledge) cannot block in the minds of the juror any other possible inferences which could be drawn from the testimony. "An important element of a fair trial is that the jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." Bruton v. United States (Mo 1968) 88 S.Ct. 1620, 391 U.S. 123. It is Petitioner's contention that Roberts' testimony was not relevant and that it was overly prejudicial.

The defense called Joseph A. Capalbo, the law partner of trial counsel to attest to a bribery attempt made by Bayless. Prior to Mr. Capalbo's testimony, the court indicated to the Assistant U.S. Attorney that any reference to alleged illegality in taping the Bayless-Capalbo-Acosta interview would be inadmissible.

Nonetheless, the question was asked of Mr. Capalbo "But you know it's a violation of California law not to do that?" Although the court sustained the objection to the question, no cautionary instruction was given. When defense counsel sought to introduce a letter Mr. Capalbo wrote to the F.B.I. reporting the attempted bribery, the court refused to admit the letter. This letter would

have corroborated Mr. Capalbo's testimony and would have rehabilitated him to the extent that he did nothing illegal.

The impropriety of the question posed is obvious. The Prosecutor knew when he asked Mr. Capalbo the question, that the court had already indicated that it would not entertain this line of questioning. Further, under California law it is not illegal to tape a conversation which involves the crime of bribery or which is not intended to be a confidential communication. (California Penal Code Section 631).

The Court of Appeals has held that this error was harmless, however the consequences of the testimony and the subsequent refusal by the court to permit rehabiliation were that instead of demonstrating that Bayless was not only incredible, but probably a perjurer, the onus shifted to the defense to defend itself because Petitioner and the law firm representing him were accused of "illegal wiretapping". Whether an error is "harmless" or not depends upon the effect it has: "The question is whether there is a reasonably possibility that the evidence complained of might have contributed to the conviction." Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229. When compounded with the Roberts' statement, the prosecution had the advantage of showing, through testimony which should not have been admitted that not only was Petitioner guilty but his attorneys were involved

in nefarious practices.

It has been said that "Fair play is the essence of due process", Galvan v. Press, Cal 1954, 74 S.Ct. 737, 347 U.S. 522. Here we have a prosector who knowingly questioned a witness about something which the court had specifically ruled was not to be gone into. In a deliberate, unfair jab "below the belt", the prosecution impugned the integrity of Petitioner's lawyers.

The court's failure to allow rehabilitation further aggravated the situation because the jury was left with only the negative intimations of illegal activity.

It is Petitioner's contention that these errors were not harmless and were extremely prejudicial to his right to a fair trial.

IV

CONCLUSION

For all of the reasons hereinabove set forth, factual and legal, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Dated: August 10, 1979

Respectfully submitted,

HERBERT E. SELWYN

Attorney for Petitioner

APPENDIX "A"

FILED
JUL 16 1979
Emil E. Melfi, Jr., Clerk
U. S. Court of Appeals

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee No. 77-1380
vs.
MICHAEL ISSAC LASKY,
Defendant-Appellant

UNITED STATES OF AMERICA,
Plaintiff-Appellee No. 77-1439
vs.
DARLEEN ELFORD,
Defendant-Appellant

UNITED STATES OF AMERICA
Plaintiff-Appellee, No. 77-2168
vs.
TIMOTHY A. LANTZ, OPINION
Defendant-Appellant

Appeal from the United States District Court
for the Central District of California

Before: MERRILL, GOODWIN and TANG,
Circuit Judges. TANG, Circuit Judge:

Defendants Lasky, Elford, and Lantz appeal from jury verdicts finding the defendants guilty of multiple counts of mail fraud in violationof 18 USC §1341.

On appeal, the defendants raise the following objections: (1) that the United States Attorney was required to inform the grand jury of the favorable outcome of a postal administrative hearing; (2) that collateral estoppel bars the initiation of the current criminal prosecution; (3) that certain evidence was improperly admitted; (4) that the evidence was insufficient to support the convictions; (5) that the government's examination of two witnesses was improper; and (6) that the court erred in restricting defense counsel's closing argument.

We find none of the alleged errors requires reversal and affirm the respective convictions.

Lasky was the president of Space Advertising, Inc. (Space). Elford was the office manager, and Lantz acted as supervisor of sales and collections. Space was in the business of soliciting the placing of orders for advertising in various newspapers in the Los Angeles area and charging fees for advertising so placed.

The business practices of Space became the subject of an investigation by the consumer protection office of the United States Postal Service. The Postal Service filed an administrative complaint seeking the suspension of mail service to Space. The complaint alleged Space violated 39 U.S.C. §3005[1] by using the United States

mail to bill businesses for advertisements placed by other advertising agencies or to bill businesses for advertisements never placed. An administrative law judge held a hearing and dismissed the action on the grounds that the evidence failed to show that Space was engaged in a scheme or device for obtaining money or property through the mails by means of false representations.

In April of 1976, the three appellants and two other defendants were indicted on 48 counts of mail fraud, in violation of 18 U.S.C. §1341. The indictment charged that the defendants fraudulently procured vast sums of money, primarily by establishing sham advertising companies and falsely representing to businesses that they operated advertising companies which would, for a fee, place advertisements in various publications supporting minority and veteran groups. The defendants often represented to customers that their businesses' reputation would be enhanced by advertising in certain minority and veteran publications, which sham publications were created by Space and had little or no distinction.

The defendants were also alleged to have used various deceptive business practices, such as double billing, representing that ads had already been authorized when in fact they were unauthorized by the company billed and billing for ads neither authorized nor published.

Lasky, Lantz, and Elford were found guilty by a jury of 23, 10, and 17 counts respectively, on an amended indictment that reduced the number of counts submitted to the jury from 48 to 23.

I

Defendants' contention that the grand jury should have been informed of the dismissal of the administrative complaint heard by the administrative law judge can be quickly set at rest. In United States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977), cert. denied, 435 U.S. 944, 98 S.Ct. 1526 (1978), the court followed the Supreme Court's holding in Costello v. United States, 350 U.S. 359 (1956), and said "only in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to a grand jury should the trial judge dismiss an otherwise valid indictment returned by an apparently unbiased jury." The prosecution was not required to present the grand jury with evidence which would tend to negate guilt. United States v. Yo Hata and Co., Ltd., 535 F.2d 508 (9th Cir.), cert. denied, 429 U.S. 828 (1976).

II

The defendants next contend that the district court should have granted their motion to dismiss the indictment under the doctrine of collateral estoppel. Defendants contend the administrative law judge's determination that the Postal Service had failed to establish a violation of 39 U.S.C. §3005 should have precluded their prosecution for similar acts under 18 U.S.C. §1341.

Since the endorsement of the proposition by the Supreme Court in United States v. Utah Construction Co., 384 U.S. 394, 421-11 (1966), courts have increasingly given res judicata and collateral estoppel effect to the determinations of of administrative agencies acting in a judicial

capacity. See, e.g., Bowen v. United States, 570 F.2d 1311, 1321 (7th Cir. 1978). Despite this general acceptance, the doctrines are not to be applied to administrative decisions with the same rigidity as their judicial counterpart. American Heritage Life Insurance Co., 494 F.2d 3, 10 (5th Cir. 1974); United States v. Smith, 482 F.2d 1120, 1123 (8th Cir. 1973). This is particularly true where their application would contravene an overriding public policy. See, e.g., Tipler v. E. I. du Pont de Nemours and Co., 443 F.2d 125, 128 (6th Cir. 1971). Thus, the need to proceed cautiously in this area is acute, and due regard must be given in each case as to whether the application of the doctrine is appropriate in light of the particular prior administrative proceedings.

The application of the doctrine to the facts of this case is novel. We have found no case in which a defendant in a criminal proceeding sought to use a prior favorable administrative decision to preclude trial of the matters contained in the indictment. However, since the defendants failed adequately to raise the applicability of the doctrine of collateral estoppel before the district court, we need not determine this novel issue.

Prior to trial the defendants moved to dismiss the indictment on three grounds, one of which was based on the doctrine of collateral doctrine. In support of their motion, defendants attached the decision of the administrative law judge dismissing the Postal Service's complaint. The district court was unable to isolate the issues that were present in both the administrative hearing and the forthcoming trial. The court made repeated

requests to the defendants to supply the court with record citations showing the identity of issues, but the defendants did not respond. Eventually, by a minute order, the court requested that "counsel will designate in a proper memorandum, with exhibits attached, the documents, with references to page and line number, that you wish the Court to consider in deciding the issues of collateral estoppel and violation of Dionisio." (emphasis in original). The defendants never responded to th is explicit order. The court denied the motion to dismiss the indictment.

Defendants' failure to raise adequately the issue before the district court bars our consideration of the issue on appeal. Initially, we note that the criminal defendant claiming that collateral estoppel applies has the burden of proving what issues were decided in his favor at the prior trial. See Turley v. Wyrick, 554 F.2d 840, 842 (8th Cir. 1977), cert. denied, 434 U.S. 1033 (1978); United States v. Barket, 530 F.2d 181, 188 (8th Cir. 1976). Since the doctrine of collateral estoppel applies only to matters actually litigated, it is imperative that the party claiming estoppel adequately show the controlling facts of the prior litigation. See Bryson v. Guarantee Reserve Life Insurance Co., 520 F.2d 563, 566 (8th Cir. 1975). It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated. Unless the defendant establishes a sufficient record in the trial court as to the issues necessarily determined in the prior proceeding, he is barred from raising the

issue of collateral estoppel on appeal. See United States v. Smith, 446 F.2d 200, 203 (4th Cir. 1971).

It is apparent to us that, by failing to specify the identity of issues to the trial court, the defendants failed to meet their burden of proving what issues were actually litigated in the prior administrative proceeding. At this point, we can only speculate whether there was an identity of issues in the two proceedings.[2] The record before the district court was inadequate for it to determine whether it should apply the doctrine of collateral estoppel; in these circumstances we will not consider the issue on appeal. See United States v. Smith, 446 F.2d 200, 202-03 (4th Cir. 1971). By failing despite the district court's repeated request to show specifically from the record of the prior proceeding that there was an identity of issues actually litigated, the defendants failed to meet their burden of proof. Id. See Turley, 554 F.2d at 842 n.2; United States v. Feinberg, 383 F.2d 60, 71 (2d Cir. 1967).

III

Defendants' third contention is that the court committed reversible error by allowing into evidence certain complaint letters received by Space from companies which had been billed for advertising services. The complaints consisted of letters written directly to Space as well as letters written to the Better Business Bureau and forwarded to Space by that agency.

The letters were admitted into evidence for the purpose of showing that the defendants had notice of complaints from various businesses

about the billing and other business practices of Space. The court twice informed the jury that the letters were to be considered for notice purposes only, once when the letters were received into evidence and again when the jury was instructed.

It is error to admit complaint documents against a defendant absent independent evidence that the defendant had actual knowledge of the documents. Phillips v. United States, 356 F.2d 297 (9th Cir. 1965). In the instant case the government proved actual knowledge by the defendants of the documents' existence. The record shows the letters were kept in Lasky's office, that Lasky paid particular attention to any letter that threatened to inform the authorities, and that the complaint letters were attached to the files when they were sent to other employees for collection purposes. On these facts we find that the district court did not exceed its discretion in ruling the evidence admissible. United States v. Kearney, 560 F.2d 1358 (9th Cir.), cert. denied, 434 U.S. 971 (1977).

IV

In viewing defendants Lantz and Elford's claim that the evidence was insufficient to support conviction, this court is required to view the evidence in a light most favorable to the government. United States v. Glasser, 315 U.S. 60 (1942). The evidence shows both Lantz and Elford were in supervisory positions within Space and played active roles in the fraudulent schemes. The evidence is more than sufficient to uphold the jury's verdict.

V

Defendants' fifth claim of error relates to questions the prosecution asked of two witnesses. On redirect examination, the government elicited a statement from a witness that he had modeled his business after Space's business. The defendants contend that the testimony was irrelevant. We find the testimony was relevant to reflect the witness's knowledge of the business practices of Space. The court did not abuse its discretion in overruling the defense objection to the question. United States v. Kearney, supra.

The defendants also contend that a question directed to defendant Lasky's attorney's law partner was improper. The law partner had recorded a pretrial conversation with a government witness without disclosing that the conversation was being recorded. The court had earlier advised the government, outside the jury's presence, that any mention of any alleged violations of law relating to the taping would not be allowed. With knowledge of the court's earlier statement, the prosecution asked the law partner on cross examination: "But you know it's a violation of California law not to do that?" The court sustained the defense objection to the question.

The prosecution claims that the recording of the statement without the witnesses' consent was deceitful, therefore bearing on the law partner's credibility and truthfulness as a witness. Although the prosecution's argument does not justify asking a question that he knows is objectionable, we find the error to be harmless beyond a reasonable doubt. Chapman v. California,

386 U.S. 18 (1967).

VI

Defendants' final contention is that the trial court's restriction of defense counsel's closing argument impeded defendant's right to effective assistance of counsel.

Defense counsel attempted to argue that no matter how voluminous the evidence appeared, the government dug up only 23 counts to prosecute. Defense counsel was aware that the original indictment contained 48 counts of mail fraud. Neither the number of counts originally charged nor the number of counts ultimately tried are relevant to the defendants' guilt or innocence on the counts tried. The trial court properly acted within its discretion in refusing to let defense counsel continue that line of argument. United States v. Masterson, 529 F.2d 30 (9th Cir.), cert. denied, 426 U.S. 908 (1976).

AFFIRMED.

FOOTNOTES

1 Along the same lines, the defendants argue that the criminal prosecution violated the fifth amendment prohibition against double jeopardy. See Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Dipp, 581 F.2d 1323 (9th Cir. 1978); United States v. Hernandez, 572 F.2d 218 (9th Cir. 1978). This prohibition applies, however, only to successive criminal proceedings. The postal hearing, brought pursuant to 39 U.S.C. §3005, is civil in nature. The purpose of §3005 is not punitive, but, instead, is designed to protect the public. Commissioner of Internal Revenue v. Heininger, 320 U.S. 467, 474 (1943); Lynch v. Blount, 330 F.Supp. 689 (S.D.N.Y. 1971), aff'd, 404 U.S. 1007 (1972). Even if the individual defendants had been parties to the postal hearing, which they were not, jeopardy would still not have attached because §3005 contemplates suspension of mail service, not loss of liberty.

2 We do note that the administrative proceeding took only three days, although the criminal trial was over a month long and consumed 22 volumes of transcript. Further, although overlapping, the periods of time alleged in the civil complaint and criminal indictment were different. These facts make it very probable that some of the defendants' practices on which their convictions are based were never raised before the administrative law judge.

No. 79-252

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL ISAAC LASKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 600 F. 2d 765.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1979. The petition for a writ of certiorari was filed on August 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government was collaterally estopped by a prior administrative decision from prosecuting petitioner.

2. Whether the indictment should have been dismissed because the government withheld the administrative decision from the grand jury.

3. Whether the search warrant was supported by probable cause.

4. Whether certain letters were properly admitted into evidence.

5. Whether the government's questioning of two witnesses deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 23 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to five years' imprisonment on each count, the sentences to run concurrently, and fined $15,000. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner, the president of Space Advertising, Inc., and two others used the mails in furtherance of a plan to obtain money through a false advertising scheme. The scheme realized over two million dollars and victimized businesses and, to a lesser extent, schools, hospitals and government agencies (12 Tr. 2181).[1] The scheme assumed two forms. Petitioner (working with and through associates) placed advertisements for customers in what petitioner represented to be widely distributed publications supporting disadvantaged minorities. The "publications" were in

[1]"Tr." refers to the trial transcript, and the number proceding Tr. refers to the volume. "C.T." refers to the clerk's transcript which constituted the record on appeal.

fact either throwaway circulars or a "newspaper" published by Space Advertising with a circulation limited to the parties who advertised in it (2 Tr. 148; 4 Tr. 670; 5 Tr. 771, 807; 6 Tr. 1011; 10 Tr. 1781-1783). On other occasions, petitioner billed businesses for publishing advertisements that had never been authorized, or for advertisements neither authorized nor published (3 Tr. 356-357; 4 Tr. 633-635, 645, 653, 656; 6 Tr. 1005-1006). Thousands of such billings were generated during a period when Space Advertising had virtually no sales force (8 Tr. 1320, 1328).

ARGUMENT

1. On August 29, 1975, the Consumer Protection Office of the United States Postal Service filed a civil complaint against Space Advertising and several of its corporate alter egos seeking suspension of mail service for violations of 39 U.S.C. 3005[2] (C.T. 47-50). An administrative law judge dismissed the complaint after a hearing (C.T. 55-56). Petitioner contends (Pet. 6-14) that the administrative law judge's determination served to collaterally estop the government from prosecuting this case.

Assuming *arguendo* that a criminal prosecution may be collaterally estopped by a favorable prior administrative determination,[3] petitioner's prosecution was not collaterally estopped here. To invoke the doctrine of collateral estoppel a defendant must show, *inter alia*, that

[2]39 U.S.C. 3005 provides for the suspension of mail service "[u]pon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations * * *."

[3]A civil action may be collaterally estopped by a prior administrative determination. See *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966).

the precise issue to be resolved was decided in his favor in the prior action. See *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Petitioner has not made—and indeed cannot make—such a showing.

In the district court, the only support for petitioner's estoppel claim was a copy of the administrative law judge's decision dismissing the complaint. After petitioner failed to respond to repeated requests by the court for record citations showing what issues had been raised in the postal hearing (Pet. App. A-5 to A-6), the trial judge denied petitioner's motion to dismiss the indictment, ruling that he had failed to introduce sufficient evidence of the administrative proceeding to enable the district court "to pinpoint the exact issues previously litigated" (Pet. App. A-6). That determination was affirmed on appeal (Pet. App. A-7).

Petitioner alleges here (Pet. 7) that he did not submit record citations to the district court showing the identity of issues because he was unable to obtain from the government a copy of the record of the administrative proceeding. However, even now, having obtained a copy of the record, petitioner neglects to specify precisely what alleged acts of Space Advertising were the subject of the administrative hearing. The claim of estoppel, like any other affirmative defense, is the defendant's to make. Since petitioner has failed to meet his burden of establishing that there was an identity of issues in the two proceedings, his claim of collateral estoppel was properly rejected. See *Turley* v. *Wyrick*, 554 F. 2d 840, 842 n.2 (8th Cir. 1977), cert. denied, 434 U.S. 1033 (1978); *United States* v. *Feinberg*, 383 F. 2d 60, 71 (2d Cir. 1967).

In any event, there was no identity of issues warranting application of the doctrine. The Postal Service's complaint against Space Advertising was based on eleven

alleged acts of mail fraud involving the billing of customers for unauthorized placements (see transcript of administrative proceeding against Space Advertising, Inc., lodged with the court of appeals, at 20-39, 46-82, 88-96, 119-125, 130-150, 173-182, 184-187, 224-228, 237-243, 258-262, 362-369), and the administrative law judge determined that the billings "were either the result of error or the unauthorized actions of employees of [Space Advertising] * * *" (C.T. 55). Petitioner's criminal prosecution, on the other hand, was based on 48 different and separate acts of mail fraud (C.T. 1-9).[4] Accordingly, the doctrine of collateral estoppel is simply inapplicable here.

2. Petitioner contends (Pet. 17-20) that because the government withheld the outcome of the administrative hearing from the grand jury it concealed "exculpatory evidence" and thus denied him due process of law. This claim is neither legally nor factually correct. The grand jury was, in fact, apprised of the outcome of the hearing. Testifying before the grand jury, petitioner's lawyer indicated no fewer than three times that the Postal Service had lost its case against Space Advertising (G.J. Tr. of March 25, 1976, at 7, 17, 27; see also *id.* at 22). Moreover, even if the grand jury had not been apprised of the outcome of the hearing, it is by no means clear that the administrative law judge's decision was exculpatory, since the acts upon which the grand jury based its indictment were not litigated in the Postal Service proceeding.

In any event, it is well settled that a defendant has no right to have exculpatory evidence presented to a grand jury. See *United States* v. *Ruyle*, 524 F. 2d 1133, 1136 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976). See also

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[4]Twenty-five of the counts were dropped from the indictment during trial. Petitioner was convicted on all of the remaining 23 counts.

United States v. *Brown*, 574 F. 2d 1274, 1276 (5th Cir. 1978) (no right to have evidence presented to grand jury that would undermine witness's credibility); *United States* v. *Smith*, 552 F. 2d 257 (8th Cir. 1977) (same). As this Court stated in *Costello* v. *United States*, 350 U.S. 359, 363 (1956), "[a]n indictment returned by a legally constituted and unbiased grand jury * * *, if valid on its face, is enough to call for trial of the charge on the merits." See also *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958). Since the indictment in this case was facially valid and there is no claim of jury bias, petitioner's claim provides no basis for dismissal.

3. Petitioner contends (Pet. 21-22) that the government's affidavit was insufficient to support a warrant to search the offices of Space Advertising because the affidavit failed to provide reliable information that a crime had been committed. This claim is insubstantial.

The affidavit (C.T. 63-67) stated that Space Advertising was in the business of billing corporations for unauthorized advertisements and obtaining authorization for advertisements under false pretenses. The allegations were based on interviews with five ex-employees,[5] two of whom described Space Advertising's deceptive practices in great detail, and on numerous complaint letters from victim-corporations, supported by invoices. Clearly the magistrate was justified in finding credible this abundantly detailed information. The statements of the ex-employees and complaining corporations were mutually corroborative and, given their detail, carried their own indicia of reliability. See, *e.g.*, *United States* v. *Swihart*,

[5]Two of the ex-employees were interviewed by an agent other than affiant.

554 F. 2d 264, 268-269 (6th Cir. 1977); *United States* v. *Banks*, 539 F. 2d 14, 17 (9th Cir.), cert. denied, 429 U.S. 1024 (1976); *United States* v. *Mahler*, 442 F. 2d 1172, 1174-1175 (9th Cir. 1971).

4. Petitioner also contends (Pet. 15-16) that the complaint letters should not have been admitted into evidence. He does not argue that the letters were inadmissible hearsay—a position unavailable to him since the letters were not offered to prove the truth of their contents but to establish that petitioner was aware of his company's deceptive business practices (12 Tr. 2263-2264). See Fed. R. Evid. 801(c). Rather, he claims that the letters should have been excluded under Fed. R. Evid. 403 because their prejudicial effect substantially outweighed their probative value.

Rule 403 commits to the trial court's discretion judgments involving the probative value and possible prejudicial impact of proffered evidence. Here, the probative value of the complaint letters was substantial. An essential element of the crime charged is the existence of a "scheme" to defraud. Petitioner's awareness of his company's deceptive business practices and his failure to put a stop to them is strong evidence that the challenged activities constituted a deliberate scheme rather than mere negligent business practice. Since the letters clearly established petitioner's awareness of the deceptive practices, they were key in establishing his criminal liability. See *Phillips* v. *United States*, 356 F. 2d 297, 301 (9th Cir. 1965).[6]

[6]The record shows that the letters were kept in petitioner's office, that he paid particular attention to any letter that threatened to inform the authorities, and that the letters were attached to files sent to employees for collection purposes (Pet. App. A-8).

On the other hand, any prejudicial effect of the letters was minimized by the fact that the court twice instructed the jury—once when the letters were admitted into evidence (12 Tr. 2263-2264) and again when the jury was charged (C.T. 324)—that the letters were to be considered solely on the question of notice *vel non*. Under these circumstances, the court clearly did not abuse its discretion.

5. Petitioner contends (Pet. 23-27) that questions asked by the government of two witnesses were so improper as to compel reversal. This claim is without merit.

a. On redirect examination, the government elicited a statement from David Roberts, a former Space Advertising employee who participated in the scheme and testified as a government witness, that in setting up his own business he had used Space Advertising as a model (7 Tr. 1175-1176). On cross-examination defense counsel had opened the door to this line of inquiry by questioning Roberts about his business practices (6 Tr. 1084-1085; 7 Tr. 1118-1121). Petitioner contends that this testimony was irrelevant. However, as the court of appeals concluded (Pet. App. A-9), it contributed to establishing Roberts' familiarity with the business practices of Space Advertising, about which he testified at length.

Petitioner also contends that once the government elicited from Roberts testimony that he modeled his business after Space Advertising, Roberts' earlier testimony that he had pled guilty on charges arising out of his own business practices (adduced because of its potential bearing upon Roberts' credibility) was somehow elevated to evidence of petitioner's guilt here. This claim is frivolous. Roberts also pleaded guilty to one of the counts in the instant indictment arising out of his conduct while employed at Space Advertising. If that fact can be placed

before the jury without offending the Constitution, surely there was no infirmity in apprising the jury of Roberts' plea in an unrelated case.

b. Petitioner also objects to a question asked of defense witness Joseph A. Capalbo, the law partner of petitioner's attorney. Capalbo had recorded a pretrial conversation with government witness David Bayless without disclosing to Bayless that he was doing so.[7] The court advised the government that any exploration into violations of state law arguably committed by Capalbo in his taping would not be allowed. Nevertheless, on cross-examination of prosecutor asked; " 'But you know it's a violation of California law not to [advise Bayless that the conversation was being taped]?' " (Pet. App. A-9). Petitioner quickly interposed an objection, which the court sustained. While it was of course improper for the prosecutor to breach the court's directive, that breach was, as the court of appeals found (*ibid.*), harmless insofar as petitioner's right to a fair trial is concerned. The court took immediate corrective action. The question was not answered. The question itself was not inflammatory and, standing alone, could have had little bearing on Capalbo's credibility. Moreover, the evidence of petitioner's guilt, spread out over 21 volumes of transcript, was overwhelming.

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[7]The defense alleged at trial that Bayless told Capalbo that he would change his testimony in exchange for money.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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